Office-Supreme Court, U.S.
FILED
MAY 11 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 1240

IN THE MATTER

OF

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN-FINCH PETRO CHEMICAL CORPORATION,

Debtors.

—o—

PETER JAKOBSON,

Petitioner,

AGAINST

GEORGE C. LEVIN and JAMES HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN-FINCH PETRO CHEMICAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID W. KAHN and
WILLIAM M. KAHN,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

ARTHUR D. EMIL,
Co-Counsel for Petitioner,
32 East 57th Street,
New York 22, N. Y.

LODGE APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

INDEX

	PAGE
Opinions Below	2
Proceedings in the Court Below	2
Jurisdiction	2
Statutes and Federal Rules of Civil Procedure Involved	3
Questions Presented	3
Reasons for Granting the Writ	5
Summary Statement of the Matters Involved	5
POINT I.—The opinion below erred in failing to give adequate protection to Petitioner as a *bona fide* obligee. The failure to give such protection raises an important question regarding the application of the Federal Rules of Civil Procedure. On that point there is a conflict among the Second, Third and Seventh Courts of Appeal	8
POINT II.—The order below raises serious questions regarding the power to appoint receivers in collateral proceedings which should be determined in this Court	10
POINT III.—The Court of Appeals failed to afford proper review of the determination in the District Court	12

PAGE

Point IV.—The order below raises substantial questions as to the applicable law in determination of bankruptcy Trustee rights 13

Conclusion 15

Appendix:

Opinion of United States District Court, Southern District of New York 16

Opinion of United States Court of Appeals for the Second Circuit 22

Opinion of United States Court of Appeals for the Second Circuit on Petition for Rehearing 22

CASES CITED

Campbell's Estate, In re, 164 Misc. 632, 299 N. Y. Supp. 442 (Surrog. Ct. N. Y. 1937) 15

Chatz v. Freeman, 204 F. 2d 764 (7th Cir. 1953) ... 8

Cline v. Kaplan, 323 U. S. 97 10

Cooper v. Maurer, 37 N. Y. S. 2d 992 (1942) 15

Doyle v. Gordon, 158 N. Y. S. 2d 248 (Sup. Ct, N. Y. Co. 1954) 14

Ferguson v. Bucks County Farms, Inc., 280 F. 2d 739 (3d Cir. 1960) 9

Gruenebaum v. Lissauer, 57 N. Y. S. 2d 137 (Sup. Ct. N. Y. Co. 1945) 14

PAGE

Halpert v. Engine Air Service, Inc., 212 F. 2d 860 (2d Cir. 1954) cert. granted, 348 U. S. 854 (1954) 8

Henry v. First National Bank of Ardsley, 110 N. Y. S. 2d 115 (Sup. Ct. Westchester Co. 1951) 14

I. & I. Holding Corporation v. Greenberg, 151 F. 2d 570 (2d Cir. 1945) cert. denied 327 U. S. 781 (1945) 9

Kirsner v. Kirsner, 257 App. Div. 840, 11 N. Y. S. 2d 993 (2d Dept. 1939) 13

Korell v. New York Ambassador, Inc., 108 F. 2d 294 (2d Cir. 1939) 9

Perlman v. 322 West Seventy-Second Street Co., 127 F. 2d 726 (2d Cir. 1942) 9

STATUTES CITED

Bankruptcy Act:

Section 2(a)(3), 11 U. S. C. 11(a)(3) 10

Section 2(a)(15), 11 U. S. C. 11(a)(15) 10

Section 2(b), 11 U. S. C. 11(b) 10

§67d(6), 11 U. S. C. §107d(6) 9

N. Y. Debtor and Creditor Law, §276 14

N. Y. General Corporation Law, §§60, 61 14

PAGE

N. Y. Personal Property Law, §40 9

N. Y. Real Property Law, §266 9

N. Y. Stock Corporation Law, §15 14

AUTHORITIES CITED

Collier, Bankruptcy Manual, §70.48 (1962) 13

7 Moore, Federal Practice, para. 65.02(3), 65.09 (2d ed. 1954) 11

7 Moore's Federal Practice, para. 66.05(1) (2d ed. 1955) 13

3 Remington, Bankruptcy, §§1588, et seq. (1957) .. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

In the Matter

of

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN-FINCH PETRO CHEMICAL CORPORATION,

Debtors.

PETER JAKOBSON,

Petitioner,

AGAINST

GEORGE C. LEVIN and JAMES HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN-FINCH PETRO CHEMICAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Peter Jakobson, respectfully prays that a writ of certiorari issue to review an order and judgment of the United States Court of Appeals for the Sec-

ond Circuit which was entered January 16, 1963, and which affirmed an order of the United States District Court for the Southern District of New York dated November 7, 1962 appointing John F. Kelly Temporary Receiver of a parcel of real estate located in the City of New York and known as 1050 Park Avenue, as well as of the rents and income thereof. An application duly and timely made by petitioner for a rehearing of the said order was denied by the Court of Appeals on February 13, 1963.

Opinions Below

The opinion of Judge Palmieri of the District Court was dated November 7, 1963. A *per curiam* opinion of the Court of Appeals for the Second Circuit affirming Judge Palmieri's order, was filed January 16, 1963 and the order denying the petition for rehearing was filed on February 13, 1963. The opinion of the District Court is reported in 213 Fed. Supp. 638 and the opinion of the Court of Appeals is reported in 313 F. (2d) 140. Copies of these opinions are printed in the Appendix attached to this petition.

Proceedings in the Court Below

The Court of Appeals for the Second Circuit directed argument of the appeal in this case without record, briefs or appendix.

Jurisdiction

The order and judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed, was entered on November 7, 1962—rehearing denied Feb-

ruary 13, 1963. Jurisdiction to issue the writ requested is found in Section 24(c) of the Bankruptcy Act and in Title 28, United States Code, Section 1254(1).

Statutes and Federal Rules of Civil Procedure Involved

1. Bankruptcy Act.

2. Federal Rules of Civil Procedure, particularly Rule 65(c).

Questions Presented

Trustees appointed in a Bankruptcy Court reorganization proceeding obtained *ex parte* leave to commence a plenary action to assert title to certain real property once allegedly belonging to a former officer of the corporations in reorganization. The sole basis for the suit was that the former president of the corporation had allegedly looted the corporation and that the Respondent Trustees had claims against him; that there was a strong suspicion that such president owned some undefined interest in the real estate; and that the Respondent Trustees, in order to protect that interest to be able to collect any judgment recovered against this former president, were entitled to the appointment of a Receiver of the entire property. After serving the summons and complaint in the plenary action on only the net lessee (Petitioner herein) of the record owner, the Trustees asked for the appointment of the Receiver. The Bankruptcy Court appointed the Receiver despite the absence of valid service, personal or substituted, upon the record owner or on the former President of the reorganizing corporations whose debtor he is alleged to be, and without regard to the outstanding interests of the net lessee in the property.

The questions presented include the following:

1. Whether the court may, on a motion without trial, appoint—in a plenary suit brought by the Respondent Trustees alleging fraudulent conveyance against future creditors by the former president of the debtor corporations—a Receiver of real property without requiring a bond or other security on the part of the Respondent Trustees in order to protect the interest of the *bona fide* net lessee then occupying the property, particularly when said real estate is admitted to have never been owned by such debtor corporations or even by the president charged with the unlawful acts.

2. Whether the summary disposition by a Court of Appeals which rejected the appeal from the order of the District Court solely on the grounds that it would not interfere with the continuing actions of the bankruptcy court—since to do so would render futile and nugatory the lower court's action—was a proper exercise of appellate review power.

3. Whether the Court, acting either as a bankruptcy court or in support of a plenary action, could under relevant Federal and State procedures appoint a Receiver in a case where an attack is made upon a transfer allegedly in fraud of creditors without more than mere allegations concerning a minority interest in the property involved in the chain of title by the former president of the debtor corporations and without service of process on the record owner of the property.

Reasons for Granting the Writ

The instant proceeding involves a basic conflict among the Courts of Appeal with respect to the application of Rule 65 (e) of the Federal Rules of Civil Procedure regarding the manner of the grant of relief in this matter. The manner in which appellate review by the Court of Appeals was conducted should serve equally as a cause for review to insure uniformity of judicial administration at the appellate level. Finally, there is a basic question concerning the extent of the power of District Courts sitting as bankruptcy courts, and review should, therefore, be granted as part of the supervisory power of this Court over such proceedings.

Summary Statement of the Matters Involved

Petitioner Jakobson was, under a written agreement made in March, 1962, the net lessee of a luxury apartment building located in Manhattan. Under the terms of his lease with the owner of the property, one Herbert Birrell, Jakobson was required to pay a stipulated net monthly rental and to assume the operating responsibility for the building. His financial responsibility was unlimited and provision was made for additional remuneration (and additional rent to the Lessor) in the event that Petitioner was able to increase the rental income in the rent-controlled building.

Title to the building itself had been acquired by Herbert Birrell ("Herbert"), the record owner-lessor, in 1951. Prior to that time it had been owned by Ruby Trading Corporation ("Ruby"), a New York corporation in which the Lessor, his brother (Lowell Birrell) and two other individuals were equal partners.

No less than three years after the conveyance to Herbert, Lowell Birrell ("Lowell") allegedly conceived and undertook a plan in 1955 to defraud the stockholders and creditors of certain corporations for which the respondent Trustees were and presently are Trustees in reorganization.

The Trustees obtained *ex parte* leave from District Judge Edmund Palmieri to commence a plenary suit against persons appearing in the chain of record title of the property to set aside all prior conveyances and to apply any proceeds from such suit to the alleged debt of Lowell to the reorganized corporations. Leave was granted and a summons and complaint filed. The summons and complaint were served only upon the net lessee, Petitioner herein. No one else has ever been validly served.

Before any answer had been interposed, the Trustees sought the appointment of a Receiver with respect to the property which request was made by Order to Show Cause addressed to the Petitioner lessee and to the record owner: service was effected, however, only upon the Petitioner (net lessee). No attempt was made to effect service of the summons and complaint in accordance with the provisions of the Civil Practice Act of New York for substituted service with respect to real estate located in New York. The Trustees requested the appointment of the receiver to safeguard the property, which, they claimed, rightfully belonged to Lowell, debtor of the reorganized corporations, and should be made available to the stockholders and creditors of those corporations. The Trustees claimed that the transfer of the property from Lowell to Ruby in 1944 and from Ruby, the corporation in which Lowell was a 25% owner, to Herbert in 1951 were all part of Lowell's scheme to loot the reorganizing

corporations which it is claimed Lowell conceived in 1955—at least four years before the reorganization proceedings herein were filed.

Following the appointment of the receiver and while an appeal from the order of appointment was pending, the Trustee-Respondents discontinued the pending plenary action as against the Petitioner net lessee, the sole defendant in the plenary action actually served with process, leaving no party defendant then served in said action.

No claim was made by the Trustee-Respondents that the property was at any time an asset of the reorganized corporations or that it was purchased with any property belonging to the reorganized corporation. The Trustee-Respondents based their request for leave to commence suit and for the receiver solely on unsupported allegations that Herbert, the record owner, was the nominee of his fugitive brother, Lowell.

The receiver entered upon the property and shortly thereafter notified the Petitioner net lessee that his interest in the property was terminated pursuant to the terms of the lease and thereby disaffirmed the same. No provision was made in the order of appointment of the receiver for the safeguarding of the profits to which Petitioner net lessee might have become entitled had he been permitted to continue his operation of the property.

Petitioner net lessee sought a stay pending appeal of the assumption of the control of the property by the receiver in the Court of Appeals for the Second Circuit. On the return of the motion, the Court directed that the appeal itself be heard forthwith on the same day. The appeal was argued but no written briefs or other printed matter were ever submitted. The Court of Appeals affirmed the Court below and subsequently denied a petition for rehearing.

POINT I

The opinion below erred in failing to give adequate protection to Petitioner as a *bona fide* obligee. The failure to give such protection raises an important question regarding the application of the Federal Rules of Civil Procedure. On that point there is a conflict among the Second, Third and Seventh Courts of Appeal.

Trustee-Respondents did not contest below that Petitioner-lessee was not involved in whatever nefarious motives they sought to ascribe to Lowell Birrell. No question was raised, therefore, as to the protection that Petitioner-lessee should have received as a *bona fide* obligee. The opinions below, however, made no provision for such protection.

This failure of protection is pointed up in one area in which the Circuits are in disagreement and in which this Court has once granted a writ of certiorari. It is respectfully submitted that the instant case raises, in addition to the issues already enumerated, substantially similar problems to the case in which certiorari was once deemed appropriate.

In *Helpert v. Engine Air Service, Inc.*, 212 F. 2d 860 (2d Cir. 1954), cert. granted, 348 U. S. 854 (1954), the writ was withdrawn by stipulation of the parties. That case held that Rule 65(c) which normally requires the posting of bond in order to grant injunctive or other extraordinary relief was not applicable to a plenary action by a Trustee in Bankruptcy. The Second Circuit noted its own disagreement with the Seventh Circuit which in *Chatz v. Freeman*, 204 F. 2d 764 (7th Cir. 1953) held Rule 65(c) requiring bond applicable to such proceedings. Strangely, however, the Second Circuit did not deal with previous holdings in its own Court which held that Rule 65(c) did

apply and were in line with the Seventh Circuit holding. *I & I Holding Corporation* v. *Greenberg*, 151 F. 2d 570 (2d Cir. 1945), cert. denied, 327 U. S. 781 (1945); *Perlman* v. *322 West Seventy-Second Street Co.*, 127 F. 2d 716, 718 (2d Cir. 1942); *Korell* v. *New York Ambassador, Inc.*, 108 F. 2d 294 (2d Cir. 1939).

Another Court of Appeals, in the Third Circuit, called to rule on the same question, followed the Seventh Circuit and rejected the Second Circuit view—or that expressed by the last case. See *Ferguson* v. *Bucks County Farms, Inc.*, 280 F. 2d 739 (3d Cir. 1960).

This conflict of the Second, Third, and Seventh Circuits raises the basic question which should be reviewed and determined in this Court regarding the applicability of the Federal Rules of Civil Procedure to suits instituted by Bankruptcy court-appointed officials, Trustees and Receivers. The decision in *Ferguson* v. *Bucks County*, *supra*, points up the need for clarification in a manner particularly appropriate in the instant case. The decision in that case held the District Court in error for not having required under Rule 65(c) the posting of security in connection with a preliminary injunction but simultaneously found that the filing of bond by a receiver appointed by the District Court was adequate compliance with Rule 65(c). The court virtually overlooked the purpose of a receiver's bond which merely assures honest administration of the estate entrusted to him and compliance with future court orders. Such a bond is irrelevant to the need for security to protect the transferee or other party defendant whose property is seized by a court order at the behest of Trustee or Receiver. See Bankruptcy Act, §67d(6), 11 U. S. C. §107d(6); N. Y. Real Property Law, §266; N. Y. Personal Property Law, §40.

Certainly, a doctrine that Trustees are absolutely protected in whatever act they undertake, even without color or proven right, on behalf of their estates, should not be created by implication or default. Definitive determination can be made with respect to such a doctrine, if such exists, only by this Court's ruling regarding the applicability of the Federal Rules to bankruptcy matters. This case raises the issue squarely and is appropriate, therefore, for grant of certiorari.

POINT II

The order below raises serious questions regarding the power to appoint receivers in collateral proceedings which should be determined in this Court.

A serious supervisory problem of the lower courts is raised by the very opinion of the District Judge which granted the application for a Temporary Receiver. This interpretative question regarding the Bankruptcy Act is of far-reaching import for the courts implementing that Act. The weight of controlling authority would appear to limit the appointment of receivers to those situations set forth in Section 2(a)(3) of the Act, 11 U. S. C. 11(a)(3). The District Judge took the position that by virtue of Section 2(a)(15) of the Act, 11 U. S. C. 11(a)(15), and Section 2(b) of the Act, 11 U. S. C. 11(b), the District Court's power was virtually unlimited. By implication, the District Court extended this self-asserted unlimited power into the area of parallel plenary suits. Such suits, however, have already been distinguished by this Court from mere matters of administration under the Bankruptcy Act. *Cline* v. *Kaplan*, 323 U. S. 97. There is, in addition, authority which would sharply limit the power claimed in

the District Court. See 7 Moore, Federal Practice, para. 65.02(3), 65.09 (2d ed. 1954).

The Court of Appeals made no effort to review this question and, in view of the summary nature of the proceedings before it involving the argument of the appeal without briefs and on oral argument alone, could hardly have been expected to do so. The case raises, therefore, substantial questions involving the proper limits of appointing power in the District Court which should be reviewed by this Court.

A further aspect of the confusion regarding the District Court's power in this respect may be seen in Judge Palmieri's statement of his "serious reservations concerning Peter Jakobson's [Petitioner] standing to object to this [receivership] application" since "his contract [leasehold] is still in force" and "the receiver will step into the shoes of Herbert Birrell and one of his first obligations will be to appraise the business value of the Jakobson contract and take such action with respect to it as may be advised" (Appendix, p. 21).

Presumably the reference to an alleged lack of standing arose from the argument that Petitioner had given nothing for the leasehold contract and could not be harmed by the appointment of a receiver.

Such strange reasoning assumes that Petitioner undertook no substantial obligations. The converse is true, as Petitioner was required to operate the property and to incur debts for taxes, wages, materials, supplies and other miscellaneous items. If he was successful in operating this property, he stood to make a legitimate profit depending altogether on the success of his labors and diligence. The inclusion of such a reference in the District Judge's opinion points up the necessity for guidance and

supervision with respect to this area of power of the District Court.

The inclusion of such reasoning in Judge Palmieri's opinion suggests strongly that his determination and the affirmance of the Court of Appeals were dictated more by expediency and suspicion with respect to the transactions involving Lowell Birrell, no matter how remote these were from the date of the bankruptcy of the debtor corporations. Presumptions of fraud, however, cannot serve to create powers in the District Courts which they would not otherwise possess under the Bankruptcy Act.

POINT III

The Court of Appeals failed to afford proper review of the determination in the District Court.

The extent and manner of appellate review afforded by the Courts of Appeal is a principal consideration and concern in the supervision of the federal judicial system. The summary nature of the treatment of the appeal in the instant case and particularly the apparent grounds upon which the reviewing court made its determination should be matter of concern for this Court.

If the rationale of affirmance adopted by the Court of Appeals ("a reversal * * * might render nugatory and futile further action") were generally adopted, there would never be a reversal of any Bankruptcy Court determination and perhaps few appellate reversals at all.

From its opinion it would appear that the Court of Appeals failed to consider the several questions already outlined above. In addition, no consideration was evidently given to whether the order granted by Judge

Palmieri, an extraordinary and, by its nature, emergency remedy, was necessary under the circumstances. Where real property is involved, receivership does not seem appropriate or required to protect ultimate interests. *Kirsner* v. *Kirsner*, 257 App. Div. 840, 11 N. Y. S. 2d 993 (2d Dep't 1939); 7 Moore's Federal Practice, para. 66.05(1) (2d ed. 1955). The real relief which was sought by the Trustees was to *attach* the interest, whatever it may be, of Lowell Birrell in the premises. Nothing more could be involved. But instead, the drastic remedy of an overall receivership was granted—without bond or security. More appropriate relief would have been to require first of the Respondent Trustees some effort at undertaking the requisite showing and ultimate proof. The Court of Appeals, in its summary disposition, offered no guidance in this respect. In the interest of the administration of the bankruptcy laws in the federal courts and in the general interest of the adequate appellate supervision of District Courts, certiorari should be granted.

POINT IV

The order below raises substantial questions as to the applicable law in determination of bankruptcy Trustee rights.

As in the case of many federal relief provisions, the Bankruptcy Act does not stand alone in furnishing a guide to Trustee remedies. By its very terms, the Act focuses on the provisions of creditors' rights under local law. See Collier, Bankruptcy Manual, §70.48 (1962); 3 Remington, Bankruptcy, §1588, *et seq.* (1957). Thus, only if some remedy would normally be available to creditors under applicable local law can the Trustees sustain

a pending or attempted action under Section 70(e)(1) of the Act dealing with voidable transfers in a situation where the debtor or bankrupt never owned the property alleged to have been fraudulently transferred.

The appropriate approach and analysis to be used in applying these provisions of the Bankruptcy Act, therefore, will be important not only in the case at bar where the laws of New York are directly involved, but in each and every case involving reference to state law giving content to the federal directions.

In the instant case, the opinions below require extension of New York Debtor and Creditor Law provisions regarding fraudulent transfers far beyond anything that can be tortured from the statute and equally far beyond any reported state cases. The property to which claim is made was never owned or controlled by the corporations involved and clearly could not even remotely be said to form part of their estate in bankruptcy. Title was transferred, by Respondent Trustees' own allegations, before the allegedly looting officer, in the remote chain of title, had even allegedly conceived his plan to defraud the corporations in reorganization. The property was acquired by Ruby in 1944. It was transferred by Ruby to Herbert in 1951. Lowell allegedly commenced his plan to defraud in 1955. The plenary action was commenced in 1962—11 years after the alleged fraudulent transfer. N. Y. Debtor and Creditor Law, §276; N. Y. Stock Corporation Law, §15; N. Y. General Corporation Law, §§60, 61; *Doyle* v. *Gordon*, 158 N. Y. S. 2d 248 (Sup. Ct. N. Y. Co. 1954); *Gruenbaum* v. *Lissauer*, 57 N. Y. S. 2d 137 (Sup. Ct. N. Y. Co. 1945); *Henry* v. *First National Bank of Ardsley*, 110 N. Y. S. 2d 115 (Sup. Ct. Westchester Co. 1951).

Perhaps more significant, even from the point of view of the federal Act itself, is the fact that the Trustee-respondents, in requesting the appointment of a receiver, scarcely attempted to make a showing of the fraudulent attempt which would ultimately have to be proven to sustain their allegations. Not only was a "threshold level" of proof not met; it was not even alleged. *Cooper* v. *Maurer*, 37 N. Y. S. 2d 992 (1942); see also, *In re Campbell's Estate*, 164 Misc. 632, 299 N. Y. Supp. 442 (Surrog. Ct. N. Y. 1937). Whether a District Court can assert its power to appoint a receiver without even a colorable showing of that level of proven intent to defraud which is required by local law is a matter requiring determination by this Court to furnish necessary guidance to other District Courts.

CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that this petition for writ of certiorari should be granted.

PETER JAKOBSON, *Petitioner*,
By DAVID W. KAHN,
Attorney for Petitioner.

WILLIAM M. KAHN,
ARTHUR D. EMIL,
LAWRENCE A. KOBRIN,
Of Counsel.

APPENDIX

Opinion of United States District Court, Southern District of New York

PALMIERI, J.

The Trustees, engaged in the reorganization of various corporate debtors pursuant to Chapter X of the National Bankruptcy Act, have moved for the appointment of a Receiver to manage and control certain property in New York City pending the determination of its ownership and of their right to recover damages. The property in question consists of a 14 story and penthouse apartment building located at 1050 Park Avenue in New York City.

The evidence submitted upon this motion by the Trustees justifies strong suspicion that this property has been partly owned if not controlled by Lowell Birrell, a fugitive from justice, presently reported to be residing in Rio de Janeiro, Brazil. The title to this property has been held by Herbert A. Birrell, a citizen of the United States, a lawyer, and a brother of Lowell Birrell. Herbert acquired title as a result of a corporate transfer planned and executed by Lowell in an apparently successful attempt to frustrate and defeat parties with financial claims against him. Herbert Birrell has for many years been associated with the business activities and enterprises of his brother Lowell and it is not improbable that his record ownership of this property has been a device for the protection and comfort of Lowell Birrell. Indeed, since the flight of Lowell Birrell to Brazil in 1959, to avoid prosecution for many crimes for which he stands

indicted.[1] Herbert Birrell has been making periodic payments to Lowell Birrell's wife, Merrie. These payments were made through one Hugh H. Begley, who has had a long association with Lowell Birrell and his enterprises. The monies paid to Mrs. Birrell have not, in her opinion, been sufficiently large and toward the end of 1961, she had a disagreement with Herbert Birrell which led her to make threats to the effect that if she did not receive more money, she would tell everything that she knew. Indeed, she has asserted rights of ownership in this property.

This disagreement between Herbert A. Birrell and Mrs. Lowell Birrell apparently precipitated a number of strange financial transactions with respect to this building. In December 1961 Herbert Birrell successfully applied for an increased first mortgage on the property in question in the sum of $1,100,000. The existing first mortgage on the property was in the sum of $442,734.94. An equivalent amount from the new first mortgage money was paid to the prior mortgagee to liquidate it. The balance of over $650,000 has disappeared and is beyond the control of this Court except for the sum of $50,000 which appears to have been reserved for alteration of the premises. The very substantial sums making up the balance of this first mortgage money were deposited in banks situated here and in various outlying jurisdictions, and in almost every instance each bank account was closed out a short time after the money was deposited. There was no apparent business reason for mortgaging this

[1] Lowell Birrell was indicted in what was then the New York State Court of General Sessions, New York County, charged with 69 counts of larceny in the first degree for the fraudulent manipulations and theft of securities and property of Swan-Finch. He has been similarly indicted for various serious charges involving fraudulent manipulation of assets and securities in the United States District Court, Southern District of New York, and in the Superior Court of the State of California, Los Angeles County.

property so heavily or for disposing of the funds in the manner indicated.

Contemporaneously with the conclusion of the mortgage transaction just described, Mr. Herbert Birrell moved from his penthouse apartment situated in the premises in question and departed for Canada. The Trustees attempted in vain to communicate with him over a period of several months and were never advised that his departure was final and irreversible. They were led to believe that he had departed for an extended hunting trip and it was only upon the argument that his attorneys appeared specially and took the position that Herbert Birrell had become a bona fide resident of Canada without any apparent intention of returning to this country. It was also stated by them that Herbert Birrell was contemplating a safari in Africa.

Upon departure from New York, Herbert Birrell transferred the management of the property to one Peter Jakobson, a tenant of the property, who is also in the real estate business. Although the form of written contract between Herbert Birrell and Peter Jakobson is that of a net lease, it is subject to cancellation upon 60 days' notice at the end of any month and upon the payment of $5,000 pursuant to a specified form of accounting. To all intents and purposes, Jakobson is the agent of Herbert Birrell.

There is little doubt, in view of the facts detailed above, that the appointment of a receiver would be appropriate if the Court possesses the power to grant this remedy. It has been asserted, however, primarily on the basis of Section 2(a)(3) of the Bankruptcy Act,[2] that such power is lacking. Section 2(a)(3) expressly authorizes appointment of a receiver to take charge of the bankrupt's prop-

[2] 11 U. S. C. §11(a)(3).

erty until the petition is dismissed or the trustee has qualified. It is claimed that the section by necessary implication precludes appointment of a receiver in a situation such as this in which the trustee has already qualified. This argument is made in spite of Section 2(a)(15),[3] which provides that the bankruptcy court may "Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title;" and in spite of Section 2(b),[4] which provides that "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

To give Section 2(a)(3) such a restrictive effect represents an overly broad reading of that section, and an overly narrow interpretation of the powers accorded a district court by the Bankruptcy Act. The purpose of Section 2(a)(3) is to provide a means of conserving the bankrupt's property between the filing of the petition and either its subsequent dismissal or the appointment of a trustee.[5] Accordingly, the receiver is empowered to take charge of the property; to protect the interests of creditors; to prosecute or defend any pending suit; and to commence or prosecute suits of its own. The limitation that arises from the language "until . . . the trustee is qualified" is directed primarily to the situation in which the trustee has already been appointed and yet the receiver continues to assert its right to administer the estate. It would be unseemly if the receiver and the trus-

[3] 11 U. S. C. §11(a)(15).

[4] 11 U. S. C. §11(b).

[5] See 1 Collier on Bankruptcy, §2.24, at 209 (14th Ed. 1961).

tee, both allegedly acting in the interests of creditors and as officers of the court, were permitted to dispute with each other over administration of the bankrupt's estate. Exactly such a dispute was in prospect in the *Empire Finance* case[6] cited by counsel for Herbert Birrell, and was undoubtedly the reason for the holding that the bankruptcy court had no general equity power to appoint a receiver who would oppose certain facets of the trustee's administration.

In this case, however, it is the Trustees themselves who are asking for the Receiver. Thus, no danger of conflict is present. Furthermore, this application is not made in the context of overall administration of the bankrupt's affairs, as contemplated by Section 2(a)(3), but is solely to preserve a single piece of property now in the hands of a third party.

If more specific authority for this Court's power were needed, reference could be had to *Steelman* v. *All Continent Corp.*, 301 U. S. 278 (1937) and *In re Mitchell*, 278 Fed. 707 (2d Cir. 1922). The precise holding in *Steelman* was that a bankruptcy court possessed the power to enjoin a proceeding brought by a third party in another district court, when that proceeding would interfere with, indeed, severely frustrate, the bankruptcy action. In the course of the opinion, Justice Cardozo specifically suggested that a receiver could be appointed to manage and preserve the property involved pending the outcome of a plenary suit between the trustee and the other claimants.[7] Although it is not clear from the opinion whether Justice Cardozo was referring to appointment of a receiver by the bankruptcy court, or by the court hearing the

[6] *In re Empire Finance Corp.*, 1 F. Supp. 298 (N. D. Cal. 1932).

[7] 301 U. S. 278, at 287.

plenary suit, his reference is undoubtedly equally applicable to both.[8]

In the *Mitchell* case, the Court of Appeals had before it the question of the validity of an order requiring a third party to deposit a contested fund into court or to give equivalent security. This order had been obtained by a receiver of the estate appointed prior to the qualification of a trustee. In affirming the order, the Court pointed out that had the receiver possessed the same standing as a trustee to litigate claims, that an equitable remedy to preserve the property held by the third party, including that of a receivership, would have been proper.[9] The fact that the receiver was believed by the district court not to possess such standing did not detract from the power to preserve the property until a trustee could be appointed and suit prosecuted to its termination. These decisions leave no doubt that this Court possesses power to appoint a Receiver for 1050 Park Avenue.

Totally apart from the Court's power in this matter, I have serious reservations concerning Peter Jakobson's standing to object to this application. His contract is still in force. There is no need, therefore, to consider his objections to the appointment of the Receiver since for the time being, at least, the Receiver will step into the shoes of Herbert Birrell and one of his first obligations will be to appraise the business value of the Jakobson contract and take such action with respect to it as he may be advised.

An order appointing the Receiver is filed herewith.

Dated: New York, N. Y., November 7, 1962

.....

EDMUND L. PALMIERI
U. S. D. J.

---

[8] See also *Halpert* v. *Engine Air Service, Inc.*, 212 F. 2d 860, 862-63 (2d Cir. 1954).

[9] 278 Fed. 707, at 710.

Opinion of United States Court of Appeals for the Second Circuit

PER CURIAM:

This is one of a series of proceedings in the complicated affairs of the debtors in the Chapter X bankruptcy of the debtors described in the title of this case. Under the circumstances we think a reversal of this order might render nugatory and futile further action by Judge Palmieri. See *Ferguson* v. *Tabah*, 2 Cir., 1961, 288 F. 2d 665, affirming *sub. nom. Ferguson* v. *Birrell*, S. D. N. Y., 1960, 190 F. Supp. 506; *McDonnell* v. *Tabah*, 2 Cir., 1961, 297 F. 2d 731, affirming, S. D. N. Y., 1961, 196 F. Sup. 496; *Pettit* v. *Doeskin Products, Inc.*, 2 Cir., 1959, 270 F. 2d 95, rehearing denied, 270 F. 2d 699, cert. denied, 362 U. S. 910; *Saltzman* v. *Birrell*, S. D. N. Y., 1957, 156 F. Supp. 538.

The appeal is from the order of November 30, 1962, appointing a receiver of the premises at 1050 Park Avenue, New York City. We affirm. See opinion below filed November 7, 1962 (not reported).

Affirmed.

Opinion of United States Court of Appeals for the Second Circuit on Petition for Rehearing

PER CURIAM.

Petition denied.

HRM
SRW
LPM
U. S. C. JJ.

February 13, 1963